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Toward a Test for Strict Liability in Torts

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I. Introduction

The fifteen years since Fleming James addressed the question of whether manufacturers should be liable without negligence¹ have seen a remarkable expansion in the scope of strict liability in the law of torts, yet the very courts which have been the leaders in this trend have been consistently troubled by the question of how far strict liability should extend within the areas in which it is being applied.² While strict liability of the manufacturer for product defects, for example, has been announced in jurisdiction after jurisdiction,³ in many jurisdictions this has simply led to a morass of questions regarding the *definition* of "defect" and how liability for a defect relates to (a) adequacy of warnings, (b) unexpected or improper use, (c) assumption of risk, and even (d) contributory negligence.⁴ Nor is this at all surprising.

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1. James, *General Products—Should Manufacturers Be Liable Without Negligence?*, 24 TENN. L. REV. 923, 924 (1957). See also James, *Products Liability*, 34 TEXAS L. REV. 44, 192 (1955).

2. See, e.g., *Wasik v. Borg*, 423 F.2d 44 (2d Cir. 1970); *Lamendola v. Mizell*, 115 N.J. Super. 514, 280 A.2d 241 (1971); *Foster v. Preston Mill Co.*, 44 Wash.2d 440, 263 P.2d 645 (1954). See also James, *The Future of Negligence in Accident Law*, 53 VA. L. REV. 911 (1967); Kalven, *Torts: The Quest for Appropriate Standards*, 53 CALIF. L. REV. 189 (1965); and Prosser, *The Fall of the Citadel—Strict Liability to the Consumer*, 50 MINN. L. REV. 791 (1966).

Since writing this article, we have read Professor Franklin's excellent article analyzing the application of various theories of liability in cases of patient claims for hepatitis resulting from blood transfusions. Franklin, *Tort Liability for Hepatitis: An Analysis and a Proposal*, 24 STAN. L. REV. 439 (1972). The test for strict liability which we suggest in this article looks to the same kinds of practical considerations, by and large, as those which Professor Franklin takes into account in concluding that hospitals and blood banks should be strictly liable for transfusion related hepatitis.

3. See L. FRUMER & M. FRIEDMAN, *PRODUCTS LIABILITY*, § 16A[3], n.2 (1970).

4. See, e.g., as to adequacy of warning, *Alman Brothers Farms & Feed Mill, Inc. v. Diamond Laboratories, Inc.*, 437 F.2d 1295, 1303 (5th Cir. 1971); *Davis v. Wyeth Laboratories, Inc.*, 399 F.2d 121 (9th Cir. 1968); *Wright v. Carter Products, Inc.*, 244 F.2d 53, at 56-59 (2d Cir. 1957); as to unexpected or improper use, *Hardy v. Hull Corporation*, 446 F.2d 34 (9th Cir. 1971); *Schemel v. General Motors Corporation*, 384 F.2d 802 (7th Cir. 1967); *Johnson v. Standard Brands Paint Co.*, 274 Cal. App. 2d 331, 79 Cal. Rptr. 194 (1969); as to assumption of risk, *Greco v. Bucciconi Engineering Co.*, 407 F.2d 87 (3d Cir. 1969); *Sperling v. Hatch*, 10 Cal. App. 3d 54, 88 Cal. Rptr. 704 (1970); *Bartkewich*

Strict liability has never meant that the party held strictly liable is to be a general insurer for the victim no matter how or where the victim comes to grief. General insurance was not the rule in classical instances of strict liability, such as ultrahazardous activities, or in legislatively mandated instances, such as workmen's compensation, and it is not the rule in the recent instances of application such as products liability.⁵ The questions which the courts now find themselves asking (and being asked) in the new areas of application, such as products liability, involve the same basic issue as did equally difficult questions faced in traditional areas of strict liability, which were couched in words such as "natural or unnatural use" and "arising out of and in the course of employment." The issue is just where strict liability should stop.

Despite the courts' recognition that strict liability must be limited, they have seldom been very confident in trying to describe the limits. Indeed, their efforts at answering the questions posed in strict liability cases seem in many cases to degenerate into either meaningless semantic disputes or attempts at balancing the costs of the accident against the costs of avoiding it;⁶ yet the latter approach sounds devilishly like the very calculus of negligence, or Learned Hand's test for fault, which strict liability was meant to replace.

Strict liability's limits can, however, be defined in a meaningful way. The questions the courts have been asking are often highly relevant to those limits, and strict liability so limited is very different from the negligence calculus, or Learned Hand's test for fault. Analysis of strict liability's limits together with a suggested test for strict liability will, we believe, give insight into both the negligence calculus and its growing disfavor.

II. The Learned Hand Test Considered

Learned Hand's test for fault defines the defendant's duty of care as a function of three variables: (1) the probability that the accident will

v. Billinger, 432 Pa. 351, 247 A.2d 603 (1968); and as to contributory negligence, *Friedman v. General Motors Corp.*, 411 F.2d 533 (3d Cir. 1969); *Matthias v. Lehn & Fink Products Corp.*, 70 Wash.2d 541, 424 P.2d 284 (1967).

5. See as to ultrahazardous activities, W. PROSSER, *THE LAW OF TORTS* 517 (4th ed. 1971); as to workmen's compensation, S. HARPER, *THE LAW OF WORKMEN'S COMPENSATION* 470 (2d ed. 1920); and as to products liability, e.g., *Suvada v. White Motor Co.*, 32 Ill.2d 612, 210 N.E.2d 182 (1965); *Elliott v. Lachance*, 109 N.H. 481, 256 A.2d 153, 156 (1969); *Dippel v. Sciano*, 37 Wis.2d 443, 451, 155 N.W.2d 55 (1967).

6. See *Pike v. Frank G. Hough Co.*, 2 Cal.3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970); *Christofferson v. Kaiser Foundation Hospitals*, 15 Cal. App. 3d 75, 92 Cal. Rptr. 825 (1971); *Dunham v. Vaughan & Bushnell Mfg. Co.*, 86 Ill. App. 2d 315, 327, 229 N.E.2d 684, 690 (1967); cf. *Sanders v. Western Auto Supply Co.*, 183 S.E.2d 321 (S.Car. 1971). See also Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5 (1965).

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occur, (2) the gravity of the injury which will be suffered if the accident does occur, and (3) the burden of precautions adequate to prevent such accidents.⁷ If the cost to the defendant of avoiding the accident would have been less than the cost of the accident, discounted by the probability of its occurrence, the defendant's failure to avoid the accident is termed negligence.⁸

For the purpose of the first parts of this discussion, we will assume that the traditional test for fault, as given expression in Learned Hand's formula, was designed to do what Professor Posner says it was designed to do,⁹ namely to minimize the sum of accident costs and the costs of accident avoidance.¹⁰ The Learned Hand test would seem to accomplish this objective in theory, because *if it were applied perfectly*, it would put the costs of the accident on the injurer when and only when it was cheaper for him to avoid the accident costs by appropriate safety measures than to pay those costs. *Assuming injurers had the requisite foresight*, this would cause potential injurers to avoid all accidents worth avoiding, *i.e.*, those where avoidance costs less than the accident, and to have only those accidents not worth avoiding.¹¹

The application of the traditional rule of contributory negligence would make some difference, but not much. Using the rubric of the test, contributory negligence would exist when the victim, too, could have avoided the accident at a cost lower than the cost generated by the accident. Since under the traditional rule contributory negligence is a complete defense, the cost would remain on the victim despite the negligence of the injurer, *even if avoidance by the injurer would have*

7. *Conway v. O'Brien*, 111 F.2d 611, 612 (2d Cir. 1940), *rev'd on other grounds*, 312 U.S. 492; *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947).

8. Perhaps anticipating what others would do in the name of his test, Judge Hand cautioned that "[the three elements of the test] are practically not susceptible of any quantitative estimate, and the second two are generally not so, even theoretically." *Conway v. O'Brien*, 111 F.2d 611, 612 (2d Cir. 1940). See also *Moisan v. Loftus*, 178 F.2d 148 (2d Cir. 1949).

9. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972) [hereinafter cited as Posner].

10. Our assumption, more precisely, is that the object is optimization of primary accident costs. See G. CALABRESI, *THE COST OF ACCIDENTS* 26-31 (1970) [hereinafter cited as *Costs*]. But the statement in text is sufficiently accurate for purposes of this article.

11. The goal, strictly speaking, is accident cost avoidance rather than accident avoidance. It may be, for example, that minimization of the sum of automobile accident costs and avoidance costs would come about by measures designed to make automobiles "crashproof" rather than by measures directed at the avoidance of automobile accidents altogether.

In determining whether an accident cost is worth avoiding, the test would look not to the entire cost of the safety measure which would avoid it, but to the cost of that safety measure discounted appropriately to take account of all of the other accident costs that same measure would avoid. Thus the cost of avoiding a given accident is ten dollars if a 100 dollar safety device would also avoid nine other accidents of equal severity.

There are numerous other assumptions implicit in the application of any test of this kind, but this is not the place to discuss them. See *Costs*, *supra* note 10, *passim*.

cost less than avoidance by the victim. Thus, even in the wonderful, let us freely admit, fantastic world of Professor Posner, in which none of the costs of an accident are borne by third parties other than the injurer and victim, and in which there is perfect foresight, the rule of contributory negligence would prevent the negligence calculus from optimizing primary accident cost reduction. The potential injurer who could avoid a \$100 accident at a cost of \$5, knowing that the victim could do so at a cost of \$50, might well not undertake the \$5 safety measure because of his knowledge that the victim will either avoid the accident or be held contributorily negligent. Given adequate foresight, one would expect the accident to be avoided, but at a cost \$45 higher than necessary.¹²

A Learned Hand test for injurer liability with the defense of contributory negligence removed, however, would also fail to optimize accident costs, and for exactly the same reason. Under such a rule, there would be instances in which the victim who could avoid an accident more cheaply than could the injurer would fail to do so, because he would know that the injurer would nonetheless be held liable. Thus the *correct* optimizing rule, under the Learned Hand test, would be to have a doctrine of contributory negligence, but to apply it only where the cost of injurer avoidance exceeds the cost of victim avoidance.¹³

Whatever defects the Learned Hand test may have, given the existence of an absolute defense of contributory negligence, it can at least be said that if the test worked, all the accidents worth avoiding would be avoided. If they were occasionally avoided at somewhat greater expense than necessary, that would not be a matter of great consequence. At the same time, it must be recognized that all the costs of all the accidents not worth avoiding would fall on the victim, raising distributional or justice issues. We will, however, postpone consideration of those issues to a later section of this article, and limit our discussion here to primary accident cost reduction.¹⁴

If we make the assumptions under which the Learned Hand test would work adequately, the fascinating thing is that as good a result in terms of reducing primary accident costs could be achieved by a liability rule which is the exact reverse of the Learned Hand test. Un-

12. The \$45 excess cost would be avoided only in the yet more wonderful world of Professor Coase, where transaction costs are nonexistent, and a pre-accident "bribe" of the injurer by the victim would result in the injurer taking the \$5 safety measure. See Coase, *The Problem of Social Costs*, 3 J. LAW & ECON. 1 (1960), Calabresi, *Transaction Costs, Resource Allocation and Liability Rules—A Comment*, 11 J. LAW & ECON. 67 (1968), and Coase, *supra* note 10, at 135-40.

13. Professor Posner realizes this, and adds that this refinement, though not explicit in the cases, may be implicit in them. Posner, *supra* note 9, at 33.

14. See part VI, *infra*.

der such a "reverse Learned Hand test," the costs of an accident would be borne by the *injurer* unless accident avoidance on the part of the victim would have cost less than the accident. If a reverse contributory negligence test were added, the victim would bear the accident costs only if the injurer could not also have avoided the accident at less cost than the accident entailed. A reverse Learned Hand test, in other words, which always made the injurer liable without fault unless the victim were negligent, and even then held the injurer liable if he also were negligent, would do for primary accident cost avoidance just what the actual Learned Hand test with contributory negligence is said to do. The only difference between the tests is distributional. Under the Learned Hand test, the costs of all accidents *not* worth avoiding are borne by victims, whereas under the reverse Learned Hand test they would be borne by injurers.¹⁵

In focusing on the reverse Learned Hand test, we are not simply playing with mirrors. The point is that a perfect world with perfect foresight is a prerequisite to optimization of primary accident cost reduction under *either* Learned Hand type test, and that given such a world, any number of other devices would also accomplish that goal.¹⁶ To the extent that we are concerned with the practical minimization of accident costs, the choice among these devices will depend not on their *theoretical* ability to optimize accident costs given certain assumptions, but on the degree to which the particular assumptions required by each device actually do obtain.¹⁷ We will suggest a test which we think is much more likely than either Learned Hand type test to accomplish a satisfactory job of primary accident cost optimization. We also think that application of the proposed test requires asking questions which are closely related to those questions courts have always asked in strict liability cases. That is why we believe the proposed test is an appropriate one for defining the limits of strict liability.

15. As our subsequent discussion indicates, the practical implications of the two tests are also very different. It may be, for example, that one test would result in more disputes over the shifting of losses than would the other, and thus in greater administrative costs. This practical consideration was, in Holmes' view, an overriding one. See O. HOLMES, *THE COMMON LAW* (Howe ed. 1963) 76-77. But cf. *Costs*, *supra* note 10, at 261-62.

16. Consider, for example, a test pursuant to which an all-knowing accident prevention agency issues an accident avoidance order to the appropriate party whenever an accident is worth avoiding, with a sanction sufficiently severe to guarantee that the order will be followed. Compare *Costs*, *supra* note 10, at 111-13. See note 73 *infra*.

17. These assumptions relate, *inter alia*, to the cost of information to each party, the absence of psychological or other impediments to acting on the basis of available information, the administrative costs of shifting losses, and the extent to which parties actually bear the costs which the particular tests impose upon them. These are, in economists' terms, principally assumptions relating to transaction costs and externalization. See generally *Costs*, *supra* note 10, at 55-64, 143-50, 178-86, 244-50.

III. The Strict Liability Test Defined

When a case comes to judgment under either of the two Learned Hand type tests, a cost-benefit analysis is made by an outside governmental institution (a judge or a jury) as to the relative costs of the accident and of accident avoidance.¹⁸ Liability would be placed on the party initially free of responsibility only if the *decider* found the benefits of avoidance (*i.e.*, not incurring the cost of the accident) to be greater than the costs of such avoidance to that party. The strict liability test we suggest does not require that a governmental institution make such a cost-benefit analysis. It requires of such an institution only a decision as to which of the parties to the accident *is in the best position to make the cost-benefit analysis between accident costs and accident avoidance costs and to act on that decision once it is made*. The question for the court reduces to a search for the cheapest cost avoider.¹⁹

So stated, the strict liability test sounds deceptively simple to apply. Instead of requiring a judgment as to whether an injurer *should* have avoided the accident costs because the costs of avoidance were less than the foreseeable accident costs as the Learned Hand test does, the strict liability test would simply require a decision as to whether the injurer or the victim was in the better position both to judge whether avoidance costs would exceed foreseeable accident costs and to act on that judgment.²⁰ The issue becomes not *whether* avoidance is worth it, but

18. The decision may also be made by the legislature, as it sometimes is through the application of the "negligence per se" concept. See 2 F. HARPER & F. JAMES, *THE LAW OF TORTS*, § 17.6 (1956). The history of the respective roles of judges and juries in the making of the analysis can be seen in cases such as *Grand Trunk Ry. v. Ives*, 144 U.S. 408 (1892); *Baltimore & O.R.R. v. Goodman*, 275 U.S. 66 (1927); *Pokora v. Wabash Ry.*, 292 U.S. 98 (1934) (limiting *Goodman*); *Lorenzo v. Wirth*, 170 Mass. 596, 49 N.E. 1010 (1897); and *Sylvester v. Shea*, 280 Mass. 508, 182 N.E. 916 (1932). See also *Nixon, Changing Rules of Liability in Automobile Accident Litigation*, 3 *LAW & CONTEMP. PROB.* 476 (1936).

19. The cheapest cost avoider has been elsewhere defined as the party "an arbitrary initial bearer of accident costs would (in the absence of transaction and information costs) find it most worthwhile to 'bribe' in order to obtain that modification of behavior which would lessen accident costs most." *Costs*, *supra* note 10, at 135. This definition, unlike the terminology we have been using in this article, includes the costs of accident avoidance within the term "accident costs." It should be clear upon reflection that the most "worthwhile" bribe would be one to the party who is in the best position both to determine what accident cost avoidance measures will result in the minimal sum of avoidance costs and accident costs (*i.e.*, to make the cost-benefit analysis) and to act upon that determination. We do not mean to suggest that the party in the best position to make the cost-benefit analysis is always in the best position to act upon it; where that is not the case, the decision requires weighing comparative advantages.

The imposition of accident costs on the cheapest cost avoider will, of course, have its own set of distributional consequences, and these may well differ from those resulting from applications of the Learned Hand or reverse Learned Hand tests.

20. We are assuming for purposes of the discussion in text that accident costs and avoidance costs are not only ascertainable but also fungible, so that the cost-benefit analysis involves only a comparison of relative costs. We would guess that in practice the judge or jury making the cost-benefit analysis under the Learned Hand test would

which of the parties is relatively more likely to find out whether avoidance is worth it. This judgment is by no means an easy one, but we would suggest that in practice it is usually easier to make correctly than is the judgment required under either the Learned Hand test or its reverse.²¹ It also implies a lesser degree of governmental intervention than does either of the Hand type tests.²²

As a first step toward seeing what is implied in such a strict liability test, we propose to examine how the issues raised by courts in various areas of strict liability relate to the proposed test. We will do this first in an oversimplified context, treating accidents as though they involved only the injurer and the victim. Subsequently, we will examine what is implied for the test in considering accidents as events involving whole categories of victims, injurers and affected third parties.

In strict products liability cases, the first question asked is, "was there a defect?" A defect may be defined to mean simply that something went wrong. All that in turn means, however, is that a safer product might have been designed, and this would mean that there is a defect whenever there is an accident. If, instead, existence of a defect is defined to mean a failure of a product to meet levels deemed customary in the trade, then strict liability would be even less successful in achieving optimal reduction of primary accident costs than is the Learned Hand test and would be far narrower than fault.²³ It is not surprising, therefore, that courts have tended to reject both of these extremes.²⁴

be significantly affected by considerations other than the relative costs of accidents and accident avoidance, though this is expressly denied by Professor Posner. Posner, *supra* note 9, at 31-32, 33-34. These other considerations, involving the collectively determined worth of the parties or the activities they are engaged in, are in fact of crucial importance in determining the type and level of accident cost causing activities a society wishes to permit. The manner in which we would introduce them into the decision is discussed under the heading of "specific deterrence" in Costs, *supra* note 10, at 95-129, 174-98. See also notes 72 & 73 *infra* and accompanying text.

21. It is an easier judgment because it looks to questions such as which party is better informed as to risks and alternatives instead of to questions requiring the weighing of accident costs and avoidance costs, both of which must be subjectively determined by the trier of fact.

22. See pp. 1074-75 *infra*.

23. The Learned Hand test asks whether an accident avoidance measure would cost less than it would save in accident costs, and this has very little to do with custom. See Posner, *supra* note 9, at 39. Custom has not generally been a defense under the fault system, although it may be admissible as relevant to what is proper conduct under the circumstances. 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 17.3.

24. As to rejection of custom as an absolute defense in strict products liability cases, see, e.g., Williams v. Brown Mfg. Co., 93 Ill. App. 2d 334, 236 N.E.2d 125, 138 (1968); Badorek v. General Motors Corp., 11 Cal. App. 3d 902, 935, 90 Cal. Rptr. 303, 328 (1970) (dictum), both citing Judge Hand's famous opinion in The T. J. Hooper, 60 F.2d 737 (2d Cir. 1932), cert. denied sub nom. Eastern Transportation Co. v. Northern Barge Co., 287 U.S. 662. Rejection of the other extreme is implicit in rejection of the notion that a manufacturer is liable without exception for accidents arising out of the use of his products. See, e.g., the products liability cases cited in note 5 *supra*.

The courts have instead tended to determine whether a defect exists by asking a series of secondary questions relating to (a) the adequacy of warning and (b) the use to which the product was put. They have also noted that assumption of risk on the part of the victim might serve either to negate the existence of a defect or to be a defense to it.²⁵ In fact, the defense of assumption of risk may be viewed as broad enough to encompass adequacy of warning and appropriateness of product use, which are in turn appropriate ways of raising some of the questions implicit in the strict liability test we have offered.

Let us look first to adequacy of warning. Suppose that a product occasionally causes the user's leg to fall off. Failure to warn the potential user that this may happen in .0001 per cent of the cases will normally result in manufacturer liability.²⁶ But even such a warning is not likely to allow the user to make an intelligent cost-benefit analysis between accident and avoidance costs. Unless the user has reason to believe himself to be in the dangerous category and unless a close substitute exists which at some cost avoids the danger, the user is hardly in a position to evaluate the benefits of the product as against its costs. The producer may seem to be no better suited, but if we move from a static to a dynamic situation, this will not be the case. The producer is in a position to compare the existing accident costs with the costs of avoiding this type of accident by developing either a new product or a test which would serve to identify the risky .0001 per cent. The consumer, in practice, cannot make this comparison. Relatively, the producer is the cheapest cost avoider, the party best suited to make the cost-benefit analysis and to act upon it.

Should a patch test be developed which enables the consumer to identify himself as an especially risky user, the situation may well be changed. The existence of the patch test, sold together with the product and coupled with a warning, may be enough to make the consumer the party best able to avoid the costs of mishap.²⁷ This will depend in part, but only in part, on the nature of the warning and the adequacy (including ease of use) of the patch test. Even if the warning is unmistakably clear and the patch test 100 per cent accurate, however, the manufacturer may still be in the best position to make the cost-benefit analysis. For the analysis depends not only on the adequacy of the warning and the likelihood that a risky user will be able to identify him-

25. See note 4 *supra*.

26. See, e.g., *Davis v. Wyeth Laboratories, Inc.*, 399 F.2d 121 (9th Cir. 1968); *Basko v. Sterling Drug, Inc.*, 416 F.2d 417, 430 (2d Cir. 1969).

27. See, e.g., *Matthis v. Lehn & Fink Products Corp.*, 70 Wash.2d 541, 424 P.2d 284 (1967).

self, but also on the availability of alternatives to the product.²⁸ If the product is a cosmetic with many reasonably close substitutes, identifying and clearly warning the risky group will very likely put the user in the best position to choose. If instead the product is a medicine, the use of which is the only way of saving the user's life, identifying and warning the risky users probably would not suffice to make the users the better choosers.²⁹ The manufacturer would in those circumstances be best suited to compare the cost of the occasional lost leg with the *cost of further research* designed to give rise to an adequate substitute entailing fewer risks, or equivalent risks but to another definable group.³⁰

We do not mean to suggest that these examples resolve the issue, but they should serve to indicate why, when courts ask about adequacy of warning in attempting to determine whether a defect exists, they are often on the right track. The examples also demonstrate why mere clarity of warning or mere percentages of likelihood of harm may not by themselves resolve the issue. For these are only factors going to the basic question of who is in the best position to make the cost-benefit analysis and act upon it, and must be considered together with other factors such as availability of substitutes and the nature of the user's use of the product in order to determine liability.

The relevance of the use to which the product is put has seemed especially troublesome for the courts.³¹ The fact that a lawn mower was not designed to protect its driver should he care to drive it on the thoroughway ought not to be viewed as a design defect making the man-

28. Alternatives include not only alternative products, but also non-use of the product.

29. This is because the cheapest cost avoider must be able to make the required analysis and act upon it, and the only meaningful action is one which would reduce the risk. Where the product is the only medicine which will save the user's life, it is meaningless to say that the user is in a position to act upon the basis of the analysis.

The cost of action by the manufacturer in such a situation (*i.e.*, research for alternative products) may have an undesirable effect in the long run. Charging the manufacturer may unduly reduce the number or output of drug companies. Whether the long run effect, if it exists, is sufficiently adverse to negate the short run effect depends on the relative ability of the users as against the manufacturers to avoid the accident costs in the long run, that is, on which is the cheapest cost avoider in the long run. In this example it is hard to see what the user could do in the long run. In other situations, however, the long run issue may turn on the relative merits of more output in different industries.

Undesirable long run effects may, of course, be dealt with through governmental subsidies funded by lump sum taxes on the long run cheapest cost avoider; this seems to us to be a better solution by and large than denying liability. For a more detailed treatment of the problems of long versus short run cost avoidance, see Calabresi, note 12 *supra*.

30. The discussion in text over-simplifies the alternatives. The manufacturer may, for example, decide to identify the high risk users and sell the product to them at a higher price. See Costs, *supra* note 10, at 170-71. If he is allowed to do this, and if doing it is economically feasible, the long run consequences of imposing liability on him referred to in note 28, *supra*, may be avoided. See *id.* at 162, 163-72.

31. See, *e.g.*, *Brown v. General Motors Corporation*, 355 F.2d 814 (4th Cir. 1966); *Helene Curtis Industries, Inc. v. Pruitt*, 385 F.2d 841 (5th Cir. 1967).

manufacturer liable either to users or to rescuers. But neither should a warning that the lawn mower ought not to be used where there are rocks *preclude* manufacturer's liability to passers-by hit by rocks or even to the user himself. Again, the issue is who can best make a cost-benefit analysis and act on it, viewed in realistic terms. Many uses of a product, though forbidden by the producer, are actually not unexpected. Other uses, though not forbidden, are in fact so unusual as to make the user more suited to make the cost-benefit analysis than the manufacturer.

Moreover, the question whether the manufacturer could sufficiently anticipate the use³² as to be in a good position to make the cost-benefit analysis has little to do with whether society deems the use worth its costs. In other words, it is logically distinct from the question of whether the user was contributorily negligent. Thus a user may have an excellent reason for driving down the throughway on a lawn mower (the benefits of the use outweigh the costs), in which case the collective decider in a negligence/contributory negligence regime ought not to deem his conduct to be contributorily negligent. Yet such a user would in all probability be a better evaluator than the manufacturer of the costs and benefits involved. As a consequence, his strict liability suit against the manufacturer for injuries resulting from such driving would fail.³³ Conversely, the fact that a use of the product is deemed contributorily negligent does not necessarily mean that the manufacturer is not in a better position than the user to evaluate the costs and benefits. To take an example from a different area of strict liability, a worker may negligently use a piece of equipment, but his employer may nonetheless be in a better position to evaluate the relevant costs and benefits. That is, he may know the propensity to negligent use and be better able to evaluate a substitute piece of equipment which cannot readily be negligently used. This explains why contributory negligence has not been an inevitable defense to an action based on strict liability.³⁴

We hope that the foregoing discussion of adequacy of warning and appropriateness of use has caused the reader to think that what we have

32. See, e.g., *Higgins v. Paul Hardeman, Inc.*, 457 S.W.2d 943 (Mo. App., 1970); and *Dunham v. Vaughan & Bushnell Mfg. Co.*, 86 Ill. App. 2d 315, 229 N.E.2d 684 (1967), holding that an abnormal use of a product relieves the defendant from liability only if such use is not reasonably foreseeable.

33. See, e.g., *Greeno v. Clark Equipment Co.*, 237 F. Supp. 427, 429 (D.Ind. 1965), where the court stated that although contributory negligence is not a defense to strict products liability, "misuse" is a defense.

34. See, e.g., *Bachner v. Pearson*, 479 P.2d 319 (Alaska, 1970); *Barth v. B.F. Goodrich Tire Co.*, 265 Cal. App. 2d 228, 71 Cal. Rptr. 306 (1968).

been talking about sounds strangely like assumption of risk, not in its secondary, and technically improper, sense of contributory negligence, but in its original sense.³⁵ The doctrine of assumption of risk—though grossly misapplied by courts which have not looked realistically to whether the plaintiff in practice had the requisite knowledge and possibility of choice the doctrine implied—is essential to an understanding of a non-fault world.³⁶ It is, and always has been, a kind of plaintiff's strict liability—the other side of the coin of defendant's strict liability. It may even go to negate defendant's negligence, by expressing a judgment that although the defendant's conduct was not worth its costs (*i.e.*, was negligent), the plaintiff was in a better position than the defendant to evaluate the costs and benefits involved (*i.e.*, the plaintiff assumed the risk). Just as the employer may be in the better position to evaluate the costs and benefits of a piece of equipment given the likelihood of occasional employee negligence (defendant's strict liability), so a spectator at a baseball game may be best suited to evaluate the desirability of sitting in an unscreened bleacher given the likelihood of occasional negligent wild throws by the players during the game which may result in the spectator's being hit on the head (plaintiff's strict liability, or assumption of risk).³⁷ In both these situations, the conclusion as to whether an accident cost should be shifted depends not on whether a party was negligent, but rather on a judgment as to which party was in a better position to make the cost-benefit analysis irrespective of the other's negligence.³⁸ In each situation, strict liability (whether defendant's or plaintiff's) is imposed regardless of whether the other party "ought" to have done what he did.

35. In its original, or "primary" sense, assumption of risk bars recovery by a plaintiff who voluntarily and reasonably chooses to encounter a known risk. See 2 F. HARPER & F. JAMES, *THE LAW OF TORTS*, § 21.1 (1956).

36. Cf. Kalven, *Torts: The Quest for Appropriate Standards*, 53 CALIF. L. REV. 189, 206 (1965), suggesting that there is a "haunting analogy" between Chief Justice Traynor's emphasis on the inability of the consumer to detect defects in the goods he buys (*i.e.*, to avoid the risks) and the distinction drawn in terms of assumption of risk between traffic accidents and "accidents" between adjoining landowners by Blackburn, J., in *Fletcher v. Rylands*, L.R. 1 Exch. 265, 287 (1866), *aff'd sub nom.* *Rylands v. Fletcher* L.R. 3 H.L. 330 (1868).

Another interesting analogy is that between Chief Justice Traynor's emphasis on distributional considerations (see, e.g., *Escola v. Coca Cola Bottling Co. of Fresno*, 24 Cal.2d 453, 150 P.2d 436 (1944) (concurring opinion)) and Bohlen's suggestion that the judges who wrote the opinions in *Fletcher v. Rylands* sought to protect the landed gentry against the encroachments of industry. Bohlen, *The Rule in Rylands v. Fletcher*, 59 U. PA. L. REV. 298 (1911). See generally part VI, *infra*.

37. Cf. *Kavafian v. Seattle Baseball Club Ass'n*, 105 Wash. 215, 177 P. 776, 181 P. 679 (1919).

38. Thus strict liability cannot be explained as the "reverse" of negligence, or as a reverse Learned Hand test, for if it did it would have to take into account the negligence of the injurer, *i.e.*, reverse contributory negligence (see pp. 1058-59 *supra*) in determining whether to shift the cost from injurer to victim because of the victim's conduct.

The doctrine of assumption of risk, properly interpreted, not only encompasses the questions the courts are now asking about adequacy of warning and appropriateness of use, but also can be viewed as covering much of the traditional rubric by which the classical forms of strict liability were limited. These forms of liability, whether for animals, ultrahazardous activities, *Fletcher v. Rylands* situations³⁹ or even workmen's compensation, were limited in two general ways. The first limit was usually put in terms of whether the injury stemmed from the risk whose presence was the reason for making the activity strictly liable. Had a cow trespassed, or had it instead bitten a neighbor; had a tiger mangled somebody, or had it simply chewed grass; had a bomb exploded, or had it just rolled and crushed somebody's foot?⁴⁰ The second limit was usually put in terms of whether the victim had done something which, though not necessarily *negligent*, had especially exposed him to the risk. Had the victim engaged in an "unnatural" use of his land; had the victim, a zoologist, gone into the tiger's cage to study the family habits of large cats; had the victim gone where no blasting company could expect humans to be?⁴¹ In setting out these limits, the courts were in effect expressing judgments as to whether the injurer or the victim could better decide the advantages of avoidance as against accident costs. Both limits suggest questions such as who has the greater knowledge of the risk involved and who is better able to choose to avoid that risk by altering behavior should the risk appear too great. In discussing both these limits, moreover, the courts seemed to consider irrelevant the question of whether a third-party decider would approve of the decision made or not, and concentrated instead on who could best make the decision. The issue was not, in other words, whether the owner of the land *ought* to build a reservoir or keep tigers as he did. Neither was it whether the victim acted "reasonably" in engaging in an unnatural use of *his* land or in entering the tiger's cage. Instead it was whether his situation made him better suited than the owner to compare the benefits and the costs of the risk he took.⁴²

To say this, though, is to remain at much too simple a level. We have so far assumed simply an injurer and a victim, when in fact each be-

39. *Fletcher v. Rylands*, 3 H & C 774, 159 Eng. Rep. 737 (1865), *rev'd* *Fletcher v. Rylands*, L.R. 1 Exch. 265 (1866), *aff'd* *Rylands v. Fletcher*, L.R. 3 H.L. 330 (1868).

40. See, e.g., *Hartford v. Brady*, 114 Mass. 466 (1874); *Wiggins v. Industrial Accident Bd.*, 170 P. 9 (Mont., 1918); *Scribner v. Kelley*, 38 Barb. 14 (N.Y. 1862); *Troth v. Wills*, 8 Pa. Super. 1 (1897) (Wickham, J., dissenting).

41. See, e.g., *Rozewski v. Simpson*, 9 Cal.2d 515, 71 P.2d 72 (1937); *Oklahoma City v. Hudson*, 405 P.2d 178 (Okla. 1965); *Harder v. Maloney*, 250 Wis. 233, 26 N.W.2d 830 (1947).

42. See, e.g., *Rozewski v. Simpson*, 9 Cal. 2d 515, 71 P.2d 72 (1937).

longs to a category of blasters, factory owners, product users, workers, and so forth.⁴³ We have assumed that the costs of paying for accidents or avoiding them rest on the individual, and therefore that the cost-benefit decision under a strict liability rule is made at a totally decentralized level. Furthermore, we have ignored the problems which arise when the victim is neither the blaster nor the blastee, but a third party rescuer, neither the lawn mower manufacturer nor the user who rides it on the highway, but a pedestrian who is hit when it goes out of control. Such problems obviously cannot be ignored under either a fault or a strict liability standard.⁴⁴ Similarly, we have avoided the problem of who is to decide which category is in the best position to make the cost-benefit analysis and act on it, and how generalized this decision is to be. That is, we have ignored (a) who decides whether blasters are generally better suited than blastees to balance costs and benefits, (b) how many exceptions to this general notion will be permitted, and (c) who will be permitted to find that a given situation is an exception. These problems do not alter the test; they require, however, somewhat more sophistication in its application.

IV. The Strict Liability Test Refined

A. *Level and Generality of Application*

The greatest differences among areas of strict liability go precisely to the question of the level of generality at which a decision is made with respect to the category or party best suited to make the appropriate cost-benefit analysis. In blasting and ultrahazardous activities generally, the court-made decision that the blaster is best suited to make the cost-benefit analysis is at a high level of generality. In many jurisdictions the decision contemplates virtually no exceptions so long as the injury arises out of the risk which makes the activity ultrahazardous.⁴⁵ The likelihood of foolish behavior by the victim or the unusual sensitivity of some victims are deemed to be best considered by the blaster. Some courts, it is true, have raised the question of whether there would be liability if a blaster blasted in what seemed to be a totally deserted place.⁴⁶ The victim, these courts have in effect said, is better suited to gauge the costs of making his presence in such an

43. See generally *Costs*, *supra* note 10, *passim*.

44. See *Sills v. Massey-Ferguson, Inc.*, 296 F. Supp. 776 (N.D. Ind. 1969), and cases there cited.

45. See, e.g., *Bedell v. Goulter*, 199 Ore. 344, 261 P.2d 842 (1953).

46. See, e.g., *Houghton v. Loma Prieta Lumber Co.*, 152 Cal. 500, 93 P. 82 (1901); *Kendall v. Johnson*, 51 Wash. 477, 99 P. 310 (1909).

unusual place known as against the costs of taking whatever risks may be attendant on being in a place unexpectedly. But some judges have in effect reasoned that such an exception, precisely because it would require more individualized judgments, might not be worth making.⁴⁷ Perhaps an occasional victim would be better suited to make the cost-benefit analysis, but the administrative cost of dealing with such instances would not be worthwhile, given their presumed rarity.

In strict products liability, instead, the judgment, again court-made, that by and large producers are better suited than users to make the cost-benefit analysis is deemed much less generally applicable, and the manufacturer is allowed to try to show in each specific case that the user was in the best position to make the analysis. The questions asked as to the adequacy of warning and the appropriateness of use, and, in some jurisdictions, the availability of the defense of contributory negligence, suggest how far from certain courts are that the generalized premise that the producer is the cheapest cost avoider will apply to the individual case.⁴⁸ As a result, a combination of judge and jury is allowed to find that given the availability of substitutes, the adequacy of warning and the capacity of an individual user to identify himself as being especially risky or especially safe, the general assumption as to who is better suited to compare the risks and benefits will not apply. That such determinations must be made in ways which are much more realistic than were analogous decisions in old assumption of risk cases, is the lesson of cases like *Henningsen* and *Sills*.⁴⁹ But this in no way detracts from the judgment that in determining who is better suited to make a cost-benefit analysis in products liability cases, a fair degree of case by case analysis is worthwhile.

Workmen's compensation differs from both ultrahazardous activities and products liability in that the original decision was legislatively made. It also differs in that it tends to divide the decision of who is better suited to evaluate costs and benefits according to the *type of damage* rather than *type of accident*. We are not here concerned with

47. The administrative costs of making such individualized judgments would presumably be too great. See, e.g., *Whitman Hotel Corp. v. Elliott & Watrous Engineering Co.*, 137 Conn. 562, 79 A.2d 591 (1951) (Baldwin, J., concurring), noting that such limitations on strict liability for blasting "add a needless and confusing qualification or condition." 137 Conn. at 576, 79 A.2d at 598.

48. New Jersey is one jurisdiction where contributory negligence remains a defense to strict liability. *Maiorino v. Weco Products Co.*, 45 N.J. 570, 214 A.2d 18 (1965). Cf. *Cintrone v. Hertz Truck Leasing & Rental Service*, 45 N.J. 434, 212 A.2d 769 (1965). This may be in part the result of the abandonment of the defense of assumption of risk in New Jersey. See note 55 *infra*. See generally Supp. to 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 22.7 (1968).

49. *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); *Sills v. Massey-Ferguson, Inc.*, *supra* note 44.

the fact that workmen's compensation schedules are hopelessly out of date,⁵⁰ but instead with the very fact that they deal with damages on a scheduled basis. The result of this is that the measure of damages for dignitary losses and even wage losses is that of the ordinary worker doing that job. If a great violinist mangles his hand in a steel mill, causing him extreme suffering and economic loss, that is his burden. One may contrast this with cases involving ultrahazardous activities where, except in very unusual situations, one takes one's victim as one finds him. On the other hand, the fact that a worker is warned that a machine is especially dangerous, or must be used in a given way, will not negate the employer's liability, short of extremes like wanton and wilful behavior by the victim.⁵¹

Without going into further detail, one can discern a certain rationality in these cases as to the appropriate level of generality of the original liability decision and the exceptions made to it. This does not mean we agree with all of the cases, by any means. But it is not unreasonable to suppose that a violinist is the best evaluator of the relative advantages and costs of working in a steel mill, with regard to the suffering he will feel if he loses his hand, while he is not as likely to be in that position with respect to blasting injuries. Similarly, a user of a product may be well suited to evaluate whether he wishes to use a given product in a given way despite a warning of danger, whereas an employee using that same product on the job would not be so suited. If we add to the foregoing considerations the administrative costs inherent in allowing an attempt to show an exception to the general rule, it is easy to understand the levels of generality which have in fact emerged.⁵²

B. *Categories of Injurers and Victims*

So far we have discussed the problems involved in minimizing primary accident costs as if either the injurer or the victim actually bore the losses which occurred. As has been amply discussed elsewhere, that is clearly not the case.⁵³ The existence of insurance and of other ways in which a cost is removed from its initial bearer and borne ultimately by others need not be reexamined here. The effect of factors such as insurance on the choice of the party to hold liable under a strict liability test must, however, be made explicit.

50. See U.S. DEP'T OF LABOR, BUREAU OF LABOR STANDARDS, BULL. NO. 161 STATE WORKMEN'S COMPENSATION LAWS (1969).

51. See 1A A. LARSON, WORKMEN'S COMPENSATION LAW § 31 (1967).

52. The administrative costs include, of course, the likelihood of error which may result from a particularized approach, as well as the costs of adjudicating particular disputes. See COSTS, *supra* note 10, at 251, 255-59.

53. See the discussion of externalization in COSTS, *supra* note 10, at 144-50, 244-50.

It does no good to leave the accident cost on the victim in a products liability case, on the ground that he is in a better position than the injurer to make a cost-benefit analysis, if the victim will not bear the loss in any event. The issue must be whether, given the fact of this "externalization," the *actual* bearer of the loss is better suited to make the analysis than is the injurer (assuming, of course, that the injurer would bear the loss if he were held liable). The point is a simple one and need not be gone into at length. The crucial decision on who is best suited to make the appropriate cost-benefit analysis must be made among the *categories* which actually bear a loss and not among the individuals who only do so initially.⁵⁴

This point is, of course, equally valid for the two Learned Hand type tests. Sophisticated application of those tests would require that the collective judgment as to whether costs are worth avoiding be made at the level of categories which would end up paying, and not at the level of the single injurer and single victim. The fact that in practice this is almost impossible under existing fault rules is one of the weaknesses of the fault-insurance system as a device for reducing primary accident costs.⁵⁵ In theory, however, it should be admitted that one could apply a Learned Hand test at a category level. Whether the language of fault with the stigma it implies would also be appropriate to such a test at a non-individual level may be quite another matter.

C. *The Need for Realism in Applying the Test*

It should come as no surprise that considerations of knowledge, alternatives, and category levels are implicit in the search for the cheapest cost avoider. The very fact that these factors *are only implicit* in the test, however, requires us to be extremely practical in gauging their existence in specific situations.⁵⁶

54. This does not mean that there should be one liability rule for insured persons and another for the uninsured. It means instead that in devising a rule appropriate to a particular category, the availability of insurance and other means of externalizing costs should be taken into account. The resulting liability rule would thus reflect the general extent of externalization from the individual to the entire category, though the rule might well be applied to all those within the category, whether insured or not. See, e.g., *Darling v. Charleston Community Memorial Hospital*, 33 Ill. 2d 326, 336-38, 211 N.E.2d 253, 259-60 (1965), cert. denied 383 U.S. 946, abrogating the doctrine of charitable immunity in Illinois; cf. *Gelbman v. Gelbman*, 23 N.Y.2d 434, 297 N.Y.S.2d 529, 245 N.E.2d 192 (1969).

55. See *Costs*, *supra* note 10, at 244-50. The current movement for reform in the treatment of automobile accidents can be explained in part by the tendency of the traditional system to incur considerable administrative costs as a result of focusing on specific accidents in allocating costs among the parties despite the fact that the costs allocated are externalized through liability insurance.

56. A recent opinion refusing to dismiss the complaint in an action seeking recovery from the entire blasting cap industry for injuries to children caused by blasting caps is a good example of the kind of approach which is required. *Chance v. E.I. DuPont de Nemours & Co.*, 69 C-273 (E.D.N.Y., decided May 18, 1972).

In this regard, it is well to reemphasize the relational nature of the test. It does not matter that there is currently no way in which a manufacturer of a risky medicine can make it safer for users who have no realistic alternative to taking the medicine—even though the user can identify himself as an especially risky party. *Relatively*, the manufacturer is better suited to make the only cost-benefit analysis that matters, which is one between further research and current damages. The problem may be very different if the medicine has reasonably close substitutes which carry different risks for different groups of people. An example might be a birth control pill which carries some risks of thrombosis to a group which can readily identify itself (say, through a blood test), but which has substitutes—either another pill which avoids that risk but is slightly less than 100 per cent effective (and, therefore, carries a risk for another easily self-defining group, those who wish a baby under *no* circumstances and object to abortions even if legal), or other fully effective but cumbersome birth control devices. The existence of close substitutes in this case may make the user best able to conduct the appropriate cost-benefit analysis.

Similarly, the need to establish the relative ability to make a cost-benefit analysis requires us to look realistically at the ability of the parties to act upon a perception that they are in risky categories. If there are only two medicines available to combat a serious disease, one involving a .0001 per cent risk of losing a leg, and the other involving a .0001 per cent risk of losing an arm, it is not realistic to suggest that the user is well suited to act upon the findings of a cost-benefit analysis. True, violinists will tend to prefer one medicine and olympic runners the other, but for most people no meaningful choice is available, and the size of the risk involved is so small, that it seems likely that leaving the loss on the user will result in little incentive to research.⁵⁷ It seems to us preferable to make the producer liable and thereby create a situation where there is a meaningful incentive to research, even though this may somewhat increase pharmaceutical costs to people who value only their feet.⁵⁸

Realism is especially necessary when third parties are involved. Then the question is not whether, for example, the category to which the seller belongs or the one to which the user belongs is in the best posi-

57. We are not suggesting that the basic purpose of strict liability necessarily is, or should be, the creation of additional incentives toward safety research. In the example in text, our proposed test imposes liability on the manufacturer because he is the party who can, by actions reasonably to be expected, reduce the risk. See note 29 *supra*.

58. It may be that the producer is not the cheapest cost avoider in the long run, and this needs to be kept in mind in deciding whether to impose liability. See note 29 *supra*. Compare Posner at 75-76, RESTATEMENT OF TORTS, SECOND, § 402A, Comment K, and *McLeod v. W.S. Merrell Co.*, 174 So.2d 736, 739 (Fla. 1965).

tion to make the cost-benefit analysis; rather, it must be asked which category is in that position relative to the category to which the third-party victim belongs. Sometimes the third party's category is the cheapest cost avoider and then the problem is easy. At other times, however, things are not so simple. If both the manufacturer and the user are in a better position than the third party victim to make the cost-benefit analysis, the strict liability test would require, as a general rule, that the victim should recover, whether he sues the manufacturer or the user.⁵⁹ If the victim chose to sue the party other than the cheapest cost avoider, that defendant should be free to join the cheapest cost avoider as a defendant or to sue him subsequently for indemnity. In either case, the strict liability rule would make the cheapest cost avoider liable and optimization of primary accident costs would be achieved, at least if we ignore the administrative costs of joinder or of the indemnification suit. There may well be situations, however, in which the relative abilities of the manufacturer and the user to make the cost-benefit analysis are so clear, and the administrative costs of joinder or indemnification are so great, that we would deny liability if the victim made the "wrong" choice and sued a defendant other than the cheapest cost avoider. For in these cases the victim is in the best position to choose the optimal defendant and should be induced to do so. But courts may in some cases be misled into assuming that where the user is in a better position than the manufacturer to make the cost-benefit analysis, it follows that the manufacturer should not be liable to third parties.⁶⁰ This error may be compounded by a tendency to assume that in third party situations the user is in a better position merely because the manufacturer warned him.⁶¹ Instead, the fact that a manufacturer has warned the user to avoid a particular use should serve to bar a third party victim from recovering from the manufacturer only if (a) the warning is so clearly adequate as to settle the issue between manufacturer and user and (b) this fact is sufficiently known to the victim after the accident as to put him in a good position to choose the proper

59. The trend is toward strict liability of the manufacturer for injuries to third-party bystanders. See *Sills v. Massey-Ferguson, Inc.*, 296 F. Supp. 776 (N.D. Ind. 1969) and cases there cited.

60. Compare *Sills v. Massey-Ferguson, Inc.*, 296 F. Supp. 776, 783 (N.D. Ind. 1969). An analogous assumption often made is that a drug manufacturer fulfills its duty to consumers ("third parties") by warning the medical profession ("the users") of possible side effects. See, e.g., *Basko v. Sterling Drug, Inc.*, 416 F.2d 417, 426 (2d Cir. 1969).

61. Thus in the drug cases it may be assumed that if a manufacturer warns the doctor of a slight risk associated with a valuable drug, the doctor is thereby placed in a better position than the manufacturer to make the cost-benefit analysis. See, e.g., *Davis v. Wyeth Laboratories, Inc.*, 399 F.2d 121, 130 (9th Cir. 1968). This will not necessarily be the case. See pp. 1062-63 *supra*.

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defendant.⁶² The point is not so much that the concepts are hard, but rather that they can quite easily be applied erroneously.

In this respect, the history of the doctrine of assumption of risk is instructive. The doctrine asked questions like whether the defendant had the "right" to impose the risk on the plaintiff, which frequently made it circular.⁶³ An emphasis instead on knowledge and appreciation of the risk and availability of alternatives, equally part of the doctrine, might easily have enabled it to serve to absolve defendants only in those situations where the plaintiff's category was the cheapest cost avoider—where, in other words, the cost-benefit analysis was better left to the plaintiff.⁶⁴ Instead, the doctrine came to be applied in cases where knowledge and appreciation of the risk and availability of alternatives were in no realistic sense present for the plaintiff.⁶⁵ This may well have been because goals other than primary cost reduction prevailed in those cases, and the circular elements in the language of assumption of risk were emphasized while non-existent knowledge and appreciation of risk were assumed in order to suit those goals.⁶⁶ Thus applied, the doctrine has been much attacked.⁶⁷ That it survived at all suggests that the

62. Cf. *Eck v. E.I. DuPont de Nemours & Co.*, 393 F.2d 197 (7th Cir. 1968).

63. See F. HARPER & F. JAMES, *THE LAW OF TORTS* § 21.3 (1956).

64. There have been, of course, many assumption of risk cases where appreciation of the risk and the availability of alternatives have been emphasized. See, e.g., *Guerrero v. Westgate Lumber Co.*, 164 Cal. App. 2d 612, 331 P.2d 107 (1958); *Ridgway v. Yenny*, 223 Ind. 16, 57 N.E.2d 581 (1944); *Rush v. Commercial Realty Co.*, 7 N.J. Misc. 337, 145 A. 476 (1929).

65. This was particularly true in industrial accident cases antedating the passage of workmen's compensation legislation. See, e.g., *Alabama G.S.R. Co. v. Carroll*, 84 Fed. 772, 28 C.C.A. 207, 52 U.S. App. 442 (1898); *Titus v. Bradford, B. & K. R.R. Co.*, 136 Pa. 618, 20 A. 517 (1890). But see *Davidson v. Cornell*, 132 N.Y. 234, 30 N.E. 573 (1892).

66. This suggestion is a familiar one. See, e.g., *Tiller v. Atlantic Coast Line R.R.*, 318 U.S. 54, 58-67 (1943).

Compare Posner's suggestion, Posner, *supra* note 9, at 45-46, that assumption of risk was "supported by economic logic," since it served to enable the risk preferring employee (a railroad brakeman employed on a train not equipped with standard safety appliances in Posner's example) to "market his taste for risk." Of course, the same objective could have been achieved without the assumption of risk doctrine by allowing the employer to "buy out" from liability. In theory, precisely the same wage differentials and safety precautions would result as are set forth in Posner's example. See Calabresi, *Fault, Accidents and the Wonderful World of Blum and Kalven*, 75 YALE L.J. 216, 225-28 (1965). In practice, however, the assumption of risk doctrine, by placing the risk on the employee in the first instance, may not have served adequately to inform the employee of the risk he was assuming, whereas a rule placing liability on the employer unless he could "buy out" (i.e., persuade the employee to accept the risk) would presumably have served to inform the employee of the nature and magnitude of the risk. This assumes, of course, that during the period covered by Posner's study railroads were better informed about the hazards of operating without standard safety appliances than were brakemen.

67. See, e.g., Bohlen, *Voluntary Assumption of Risk*, 20 HARV. L. REV. 14, 91 (1906); James, *Assumption of Risk*, 61 YALE L.J. 141 (1952); James, *Assumption of Risk: Unhappy Reincarnation*, 78 YALE L.J. 185 (1968).

The doctrine has been abandoned in some jurisdictions, in part because of the confusion which has prevailed in its application. See, e.g., *McGrath v. American Cyanamid Co.*, 41 N.J. 272, 196 A.2d 238 (1963).

kernel of truth it contains is quite real, not that its application was often correct. Concepts like "the cheapest cost avoider" or "the category best suited to make the cost-benefit analysis" can be as easily misapplied as assumption of risk. This does not, however, mean they are useless. It only means that courts and legal scholars should be assiduous in scrutinizing their use, in criticizing misapplications and in pointing out when they are being employed to serve goals other than those of primary accident cost reduction.⁶⁸

V. The Learned Hand Test Versus the Strict Liability Test

If the strict liability test is often difficult to apply correctly, and if Learned Hand type tests might, *in theory*, be just as capable of accomplishing optimal primary accident cost reduction, why have such fault-based tests fallen increasingly into disfavor?⁶⁹ It is not likely that the answer lies simply in the existence of distributional goals which are better served by the strict liability test. That such goals are relevant we have no doubt, and we shall discuss their relevance later. But their relevance must be limited, since the two Learned Hand tests themselves accomplish diametrically different distributional results.⁷⁰ Thus if the aim of the current trend away from the fault system were simply to favor victims as a category, this could be done as well—indeed better—by shifting from the Learned Hand test to the *reverse* Learned Hand test than by shifting to a strict liability standard. The suspicion must remain that the shift to strict liability is based in part on other grounds.

It has already been noted that the Learned Hand type tests are more "interventionistic," more collective, than is the strict liability test. Under either of the Hand tests, an organ of the state decides whether an action is worthwhile or not, and imposes the costs on the actor if it deems the action *not* worthwhile. It is not hard to see that this involves a greater degree of state involvement than that implied in the strict liability test. The latter implies state intervention only to decide which category can best determine whether an action is worthwhile, and this in turn implies less risk that traditional kinds of collective considerations will come into play.⁷¹ But this difference between the tests, though politically significant, hardly accounts for the decline in popularity of the fault tests. After all, we have also seen an increase in recent

68. We do not mean to suggest that other goals are irrelevant to accident law, but that courts, legislatures and scholars should try to avoid confusing primary accident cost reduction with other goals. See part VI, *infra*, for a discussion of other goals.

69. See notes 1, 2 & 3 *supra*.

70. See p. 1059 *supra*.

71. See note 20 *supra*.

years in direct criminal prohibitions aimed at conduct in the accident area deemed not worthwhile.⁷² Such prohibitions surely involve greater state intervention than do even the Learned Hand tests.⁷³ That political preference for *laissez faire* has spurred the move toward strict liability therefore seems as unlikely as the explanation that the move has been solely influenced by distributional goals. We suspect that the move to strict liability today, no less than similar moves to respondent superior, ultrahazardous activity liability and workmen's compensation in the past, are based at least in part on a desire to accomplish better primary accident cost reduction.

Earlier we noted that it seems unlikely that either Learned Hand test could effectively be applied in practice at the category level. We questioned whether at the level where it really mattered, that is at the level of who actually pays, the rubric of "fault" is likely to be congenial. And yet it is clear that if the Learned Hand tests *are* to accomplish optimal primary accident cost reduction they must be applied at that level, and not at the arbitrary level of parties to an accident who do not ultimately bear the costs and who are not therefore given any incentive to choose avoidance even where it is worthwhile. The appropriate avoidance decisions *must* be made at a category level, and at that level the Learned Hand tests may seem unjust. Furthermore, the categories which end up bearing the losses as a result of an application of negligence tests on a case by case basis are not likely to be those which would be selected were such tests applied at a category level, nor is this technique likely to be the most efficient way available for selecting the categories which *are* chosen. All this has been discussed at length elsewhere, and need not be gone into further,⁷⁴ but it is important to note that the reluctance to apply the Learned Hand test to categories may be a significant underlying explanation for the current disfavor of "negligence" calculus type tests.

There is, however, another set of reasons which may explain the move away from Learned Hand tests. Hard though the strict liability

72. The prohibitions which have received the most attention have been those relating to automobile safety. See the Traffic and Motor Vehicle Safety Act, 15 U.S.C.A. §§ 1381-1431 (Supp. 1972).

73. For example, under either Hand type test, a party burdened with the costs because the collective deciders have deemed avoidance to be worthwhile may, at least in some cases, choose to omit safety measures and pay compensatory damages instead. In contrast, a collective prohibition is generally meant to be obeyed. See *Costs*, *supra* note 10, at 68-69.

74. See *Costs*, *supra* note 10, at 255-59. To summarize that discussion briefly: case-by-case determination entails substantial administrative costs, tends to focus on unusual rather than recurring causes and on accident avoidance rather than accident cost avoidance, and is a misleading way of compiling those statistics which are meaningful at the category level.

test may be to apply correctly, it is nonetheless easier to apply than is the calculus of fault. We have seen that it may well be difficult to know whether the category to which a seller, user or third party belongs can best make a cost-benefit analysis of risks involved and act on that analysis. But it is more difficult still to decide correctly not only who can most cheaply act on a cost-benefit analysis, but also what the result of that cost-benefit analysis must be. Yet this is precisely what the Learned Hand-type tests require of the governmental deciders if they are to achieve optimal primary accident cost avoidance. None of the significant difficulties involved in the strict liability test are avoided, and to them is added the danger that the governmental deciders will resolve the cost-benefit analysis incorrectly.

One cannot answer, moreover, that the Learned Hand-type tests avoid some of the difficulties inherent in the strict liability test by deciding collectively whether or not avoidance is worthwhile, whereas the strict liability test leaves such judgments to the individual categories. This answer is not available because the negligence tests result in compensatory damages rather than prohibitions. Individual categories are, therefore, allowed to decide that avoidance is *not* worthwhile despite a contrary determination by the collectivity (or vice versa).⁷⁵

This may serve to explain the concomitant, seemingly paradoxical rise of collective prohibitions together with the less interventionistic strict liability test, at the expense of negligence type tests. Where a collective determination that an action is *not* worthwhile can be made with a modicum of assurance, prohibitions enforced criminally or through uninsurable fines seem appropriate. Where, instead, there is serious doubt that such a collective determination of utility is likely to be correct, the best solution is an individualistic one. This implies a decision limited to selecting the best decider, the cheapest cost avoider, among the relevant categories, and not extending to which particular acts or forbearances are appropriate. Viewed in this light, the rise of criminally enforced prohibitions in some areas, and strict liability in others, rather than being paradoxical, can be viewed as a quite sensible reaction to the same stimulus—that is, to the desire to minimize the sum of accident costs and the costs of avoiding accidents.

VI. Relationship to Other Goals

We have seen that there are a variety of devices which could in theory be used to accomplish primary accident cost reduction. Concep-

75. See note 73 *supra*. Of course, a party may also decide to ignore a collective prohibition, but in considering the likelihood and magnitude of the penalty he must take into account the stigma involved, and this results in a very different kind of calculus.

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tually, they range from: (a) those in which the decision-maker is highly centralized and makes criminally enforceable determinations of which actions are worthwhile and which are not through (b) those in which negligence type calculi are employed to make the same decisions at a more decentralized but nonetheless state agency level, enforcing those decisions through compensatory damages; to (c) those in which collective decisions are made only to identify who is the cheapest cost avoider—the category best suited to determine if avoidance of accidents is worth its costs—allowing the chosen category to make the cost-benefit decision itself. We have also seen that these devices in practice imply different likelihoods of success in accomplishing primary cost avoidance. Finally, we have seen that these approaches will each have a different distributional effect. Far from being insignificant, distributional differences may well determine the approach chosen. Some discussion of distributional effects and goals is thus essential to an understanding of the two Learned Hand type tests and the strict liability alternative.

In discussing the distributional aspects of liability rules there are two problems which it is well to separate. The first relates to the types of effects that are lumped together in the concept of distribution, and the proper role of each of these effects in the choice of liability rules. The second goes to the quite different question of the appropriate role of juries and courts, as against legislatures, in selecting among liability rules in order to accomplish distributional effects.

That both problems are crucial can be seen through an example. The present Learned Hand test tends to make injurers richer at the expense of victims. The reverse Learned Hand test would have precisely the opposite effect. In choosing between them a society will presumably be influenced not only by which of the two tests is more likely to accomplish optimal primary accident cost reduction, but also, if it has such a preference, by which category it wishes to make wealthier. This choice may be affected by factors such as the initial relative wealth of the categories, but relative wealth is only a part of the choice implied. For one category may be better able to spread losses than the other, or one category may in some sense be viewed as being worthier. Sorting out the relevant effects lumped under the term distribution, therefore, is a necessary task for society in choosing among liability rules. But when that is done another series of questions remains: Which, if any, of the distributional considerations are appropriate to judicial decisions among liability rules, which are appropriate to ad hoc jury determinations, and which can only be properly settled by legislatures?

It should be plain that a full treatment of these questions cannot be

attempted in this article. Nevertheless, some indications of relevant distributional considerations and some reflections on the historical role of courts and juries with respect to these can be offered.

For the purposes of this article, we are lumping together as distributional all those effects of liability rules which do not relate to minimizing (a) the sum of accident costs and avoidance costs, and (b) the administrative costs entailed by that minimization. Thus under a society's distributional goals we are including preferences of quite varied types. These preferences may reflect a desire to distribute or fractionize losses, often called spreading. They may reflect a preference for moving toward a given distribution of wealth, such as greater wealth equality, better treatment for higher castes, or better treatment for castes which in the past have been poorly treated. They may instead reflect a desire to further what might be viewed as dynamic efficiency goals—as might occur by favoring the doers, the entrepreneurs in a society. Finally, they may reflect a society's notion, if it has one or if it has many, of rewarding individuals' merits—of recognizing their just deserts.

All of these preferences are in fact relevant in some way to the choice of liability rules. Indeed, all of them, together with the pure efficiency notion reflected in the aim of minimizing the sum of accident and accident avoidance costs, are part of what is at times called justice.⁷⁶ They are relevant because there is no a priori reason why a legislature might not choose a liability rule solely because it tends to redistribute income from, say, rich to poor. Whether a legislature would be wise to employ liability rules for this purpose is, of course, another matter. That depends on, among other things, the availability of alternative devices for accomplishing the desired income redistribution and on the effect which this use of a liability rule might have on the achievement of other goals whose effectuation is tied to the operation of such rules. But there is no logical reason why a legislature's desires with respect to income equality or caste preference cannot be well served through the choice of one liability rule as against another. Similarly, and in practice even more commonly, a legislature's preference as to spreading, desert and long run efficiency can effectively be furthered by choosing one liability rule rather than another.

Recently Professor Fletcher has argued instead that the only distributional considerations which should be considered in choosing among

76. See F. HARPER, *THE LAW OF TORTS* §§ 1, 3 & 4 (1933). See also *Bierman v. City of New York*, 302 N.Y.S.2d 696, 60 Misc. 2d 497 (Civ. Ct. of the City of New York, 1969). Cf. *Magrine v. Spector*, 100 N.J. Super. 223, 238-41, 241 A.2d 637, 646-47 (Botter, J.S.C., dissenting).

liability rules are those which relate to an individual's just desert—those which decide who is to be richer or poorer on the basis of what people have done rather than what they are or where they start out.⁷⁷ Indeed the argument goes further, and suggests that such considerations should determine the choice of liability rules regardless of any “instrumentalist” goals like the reduction of the sum of accident costs and the costs of avoiding accidents.

In one sense, it is very easy to agree with Professor Fletcher. If a society has a sufficiently well-developed theory of deserts such that all the other considerations of efficiency and distributional equity we have mentioned are reflected in that theory, then “desert” tautologically will determine the appropriate liability rules for that society. Unfortunately, we do not find ourselves able to define, let alone find, such an all encompassing theory of deserts in our society.⁷⁸ Indeed, we often find that what pass for statements of desert, of who ought to be richer or poorer on the basis of merit, can quite readily be seen as judgments based on the desire to accomplish either efficient accident avoidance or some other of the distributional preferences mentioned previously.

Nor does Professor Fletcher's test for deserts help us very much. He argues that losses ought to lie where they fall unless the victim did not create a risk “reciprocal” to the one which resulted in his being injured. Examining examples of reciprocity and non-reciprocity, we are struck by three things. The first is that frequently reciprocity is simply an approximation of the result which would be required by that most instrumentalist of tests, the strict liability test described in this article.⁷⁹ The second observation is that when reciprocity and the test we propose seem to deviate, the strict liability result appears to be more desirable.⁸⁰

77. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 547 n.40 (1972).

78. A recent book by Professor Rawls may be thought to be an attempt to formulate such a theory. J. RAWLS, *A THEORY OF JUSTICE* (1972). But see Hampshire, *A New Philosophy of the Just Society*, THE N.Y. REV. BOOKS, Feb. 24, 1972, at 34 (Vol. XVIII, No. 3) questioning whether the formulation of a complete theory of deserts is possible. See also Feinberg, Review, 81 YALE L.J. 1004 (1972).

79. The examples of liability set out by Fletcher, *supra* note 77, at 547-48, illustrate this point rather well. Liability for crop dusting as between neighbors is, we think, unrelated to whatever risks happen to be imposed upon the duster by those neighbors who breathe his dust. It is based instead on the relative ability of the duster to calculate the costs and benefits of dusting in the particular situation involved and act upon that calculation.

80. Returning to Fletcher's crop dusting example, suppose instead that the parties are a farmer who dusts his 500 acres of irrigated reclaimed desert and a homesteader who, with knowledge of the farmer's agricultural methods, chooses out of 500,000 acres of available (and equally beautiful, accessible and desirable, but undusted) desert one acre adjacent to the farmer's land for a homestead. Suppose also, to give reciprocity more than its due, that the homesteader in no way benefits from the farmer's presence, that is, he uses none of the farmer's produce. The homesteader imposes no risks on

The third observation is that when we do not approve (in terms of who is made richer and who is poorer) of a result dictated by the efficiency test, it is often in cases where reciprocity would lead to the same undesirable result.⁸¹

None of these observations should be especially surprising. Justice notions do attach to efficiency considerations such as those served by the strict liability test, and this is sufficient to explain why approximations of that test should seem just. They also attach to distributional preferences like "favor spreading," "further wealth equality," and "benefit a particular ethnic group," which go to what people are rather than what they do. This explains why that which is preferable, given a society's desire to further wealth equalization or a caste preference, may seem more desirable than the result which either a strict liability test or a reciprocity test would impose. Justice notions attach to other societal preferences which can only with difficulty be explained in terms of either efficiency or wealth distributional preferences designed to make some groups richer because of what they are. These other justice notions, which we are unable to describe in general terms, are, of course, crucial to the choice of liability rules.⁸² Indeed, we have elsewhere left room for a veto of liability rules which violate such non-generalized justice imperatives,⁸³ because to date these imperatives have not been put together in a way which would enable us to talk about them other than as constraints within which other, more generalized goals can be seen to operate. Professor Fletcher instead offers reciprocity as a way of putting these imperatives together in the field of accidents.

It is with this in mind then, that one must examine reciprocity. Is there anything about reciprocity which should make it justify making someone richer or poorer apart from efficiency and apart from distributional preferences based on what people are? When the question is

the farmer, and reciprocity would therefore seem to require holding the farmer liable for the results of dust breathing by the homesteader, regardless of the availability and cost to the farmer of alternative methods of crop protection. The strict liability test, taking into account the relative abilities of the parties to compare the costs of dust breathing by the homesteader with the costs of avoidance, and to act on the basis of such a calculation, would not impose liability on the farmer. Professor Fletcher might respond that the homesteader "creates" the risk by moving, but that response would reduce the reciprocity test to a tautology. That is, reciprocity would give no guidance for decision, but would simply be a label attached to a result reached on other grounds.

81. If the farmers were a preferred group, such as disabled veterans, whose crop dusting was essential to their livelihood, we might disapprove of a liability rule (whether based on reciprocity or efficiency) which, in effect, prevented crop dusting.

82. See Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1104-05 (1972).

83. *Costs*, *supra* note 10, at 24-26, 291-308.

thus posed, when reciprocity is viewed not as an approximation of efficiency but as an approximation of a generalized theory of desert, it turns out to be philosophically very meager.⁸⁴

If income equality, dynamic efficiency, and spreading are all relevant to a society's choice of liability rules, it does not follow that all are equally suited to being considered by courts or juries. Obviously, those which are deemed suited to judicial considerations will depend on one's view of the nature of adjudication and the role of courts and juries in a legal process. We cannot possibly begin to resolve these issues in this article. We can, however, point out some solutions which are transparently too simple, both in themselves and in terms of what courts and juries have done historically.

One cannot write off distributional considerations based on ability to spread, or on wealth or caste, as Professor Fletcher has done, with a reference to Aristotle and a comment that taxation is for legislatures and not for courts.⁸⁵ When courts chose a Learned Hand test rather than a reverse Learned Hand test, they did not simply toss a coin, given that the tests were equally efficient in theory.⁸⁶ Distributive consequences may not have been the dominant or even a conscious motive for the decisions, but it is difficult to argue that historically these consequences were irrelevant to the choice.⁸⁷ Similarly, too many courts have explicitly considered the ability to spread losses in torts cases as a factor in choosing one liability rule instead of another to allow us to dismiss its relevance to judicial decisions out of hand.⁸⁸ One can, of

84. The examples discussed by Fletcher, *supra* note 77, at 547-48 seem to indicate that the reciprocity test is temporally bound. That is, the risk imposer who does not recover is usually the party who creates an "unusual" risk. An unusual risk may mean a risk which can be cheaply avoided, but that is the strict liability test. Fletcher seems to be looking instead to which risks are new. If this is what is meant, reciprocity, without more, is incapable of serving as a philosophical theory of desert. For it would amount basically to saying only that those who take new risks are less deserving than those who take customary risks.

85. See Fletcher, *supra* note 77, at 547, n.40.

86. Here we are assuming, with Professor Posner, that historically the courts did "choose" a Learned Hand test. Posner, *supra* note 9, *passim*. Certainly they did not choose the reverse.

If for some reason the tests in practice would not equally yield optimizing solutions, if, for example, victims in practice proved far less able to alter their behavior than injurers (notwithstanding that the value of their activity was less than the resultant accident costs), then the choice of the Learned Hand test rather than the reverse would imply a distributional effect *in spite of* efficiency considerations.

87. Cf. the explanation usually given for the development of the fellow servant rule. See, e.g., W. PROSSER, TORTS 529 (4th ed. 1971). Cf. also note 66 *supra*.

88. These decisions in recent years have been an outgrowth of the concurring opinion of Justice Traynor in *Escola v. Coca Cola Bottling Co.*, 24 Cal.2d 453, 461, 750 P.2d 436 (1944). See W. PROSSER, TORTS § 5 at 22 (4th ed. 1971).

course, question the wisdom of such decisions.⁸⁹ One might further suggest that courts should consider such distributive effects only when they reflect reasonably explicit societal goals. Alternatively, one might maintain that courts should be free to follow their own distributional preferences so long as they do not conflict with well defined societal goals (such as, perhaps, efficiency), provided that the legislature has the power to reverse the court's judgment. Finally, one might support the position that because of the way judges are picked, they are suited to balance other goals, like efficiency, with explicitly distributional ones in choosing liability rules for a society. All these are possible approaches worth considering. What one cannot do, we would suggest, is to act as if distributional considerations did not historically play a role in judicial choice of liability rules, and must not do so today regardless of the strength and clarity of a society's commitment to specific distributional preferences.⁹⁰

Having said this, we do not here need to argue with Professor Posner over whether the particular choice of Learned Hand test made and applied between 1895 and 1905 was based, as many have said,⁹¹ on distributional considerations or was, as he maintains, essentially an efficiency choice.⁹² It is perfectly clear *at the very least* that that choice, both when made well before 1895 and as applied for many years, had distributional effects which are very different from those produced by alternative tests which were as, or more, likely to accomplish primary accident cost avoidance. That these different distributional goals seem to be in the ascendancy today may again help to explain the move away from the classical Learned Hand test. They do not, however, suffice to explain why the move has been to strict liability rather than to a reverse Learned Hand test, which would seem to serve the currently dominant distributional goals of spreading and distribution in favor of victims more fully than does the strict liability test.⁹³

89. See, e.g., the dissenting opinions of Chief Justice Taft in *Lonzrick v. Republic Steel Corp.*, 6 Ohio St. 2d, 227, 218 N.E.2d 185 (1966), and of Judge Burke in *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 191 N.E.2d 81 (1963). See also *Wights v. Staff Jennings, Inc.*, 241 Ore. 301, 309, 405 P.2d 624, 628-29 (1965), where the court refused to adopt strict products liability based on a "risk spreading" rationale, stating that such a theory "proves too much."

90. Other institutions may do a better job of dealing with distributional considerations, but this need not mean that courts are compelled to ignore them.

91. See, e.g., Horwitz, *Did the Legal System Subsidize Economic Growth in Antebellum America?* (unpublished paper delivered at the annual meeting of the American Historical Association, Boston, 1970).

92. Posner, *supra* note 9, at 32.

93. There have been numerous suggestions that a strict liability test serves the goal of spreading; see, e.g., James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549 (1948).

It would require another article to go into all of the distributional ramifications of

One more consideration remains in discussing the relationship to the test chosen of goals other than efficiency. Not only does the choice of test have substantial distributive effects, but its application in specific or doubtful cases does also. Thus the issue is not simply whether a society opts for a direct prohibition, a Learned Hand test, a reverse Learned Hand test or a strict liability test. Whatever goals are sought will also be at the mercy of applications of the chosen test. It is here, of course, that Fletcher's caveat about the role of courts seems more directly in point, though even here we would not be as ready as he is dogmatically to exclude considerations of distributive justice from the purview of courts and juries. The issue is a nice one and reasonable men may differ as to whether distributive considerations should apply (1) at all, or (2) only in cases where primary cost avoidance considerations do not provide a clear outcome, or (3) whether they ought to dominate over efficiency considerations even when the latter would imply a clear result.

As a practical matter, we would suggest that in applications of the traditional Learned Hand test, distributive considerations have very frequently at least played the second role and not infrequently the third. Unlike Posner, we find some support for this point of view in his admirable collection of appellate decisions.⁹⁴ Many dubious and some clearly "inefficient" decisions can be thus explained.⁹⁵ Without doing a similar study in more recent times, we would suggest that the change in the application of the fault standard since 1905 which has seemed so obvious to so many writers, may well reflect a similar kind of interplay between new distributional goals and the efficiency implications of the traditional Learned Hand test.

This kind of interplay is unlikely to stop merely because a change is made to a strict liability test which combines better primary accident cost avoidance with distributional goals which seem more congenial to the current age. Even within a regime of strict liability, courts and juries deciding which category is the cheapest cost avoider will in unclear cases most likely continue to consider whether some distributional goals are not best served by one decision rather than the other.

the strict liability test. We believe that this test would tend to favor victims as a category, because in practice they are, *inter alia*, generally less well informed than injurers, but it would not do so to the same extent as a reverse Learned Hand test, which would put the cost of all accidents not worth avoiding on injurers.

94. Posner, *supra* note 9, at 52-96.

95. We find it difficult to agree, for example, that application of the principle of respondent superior to employers but not to families was based entirely on efficiency grounds. Posner, *supra* note 9, at 43. It seems more likely that distributional considerations were relevant to that determination.

Nor would we be surprised if distributional goals will fairly frequently lead to liability results under a strict liability test which are pretty clearly wrong if one considers primary cost avoidance alone. Sometimes this will be the effect of legislative determinations, but at other times it will be the result of decisions by judge and jury—as it has been in the past. To say that this is wrong would be to conclude that once a liability test is chosen the role of the courts is to give effect only to efficiency. It may well be that this conclusion is appropriate, given the nature of courts and the lack of consensus for particular distributional preferences like spreading, greater wealth equality, or compensation of maltreated castes. This conclusion is not, however, a necessary one. Indeed, many years ago, Professor Clarence Morris argued that courts were very well suited to make just this kind of distributional decision, though only when whole *classes* of cases were affected.⁹⁶ Similarly, the ability and suitability of the jury to do the same in *individual* cases has been frequently argued.⁹⁷

As a practical matter, introducing such distributional considerations, whether at the legislative or the judicial level, does make application of the strict liability test easier, just as in the past it made application of the Learned Hand test easier. For often a hard issue of whether the victim's category or the injurer's category is best suited to make a cost-benefit analysis between avoidance and compensation becomes easy if one choice serves distributional goals while the other undercuts them. In practice it will also be as hard to tell just what the roles of efficiency and distribution were in making the choice as it is for Professor Posner and us to agree on what the roles of the two sets of goals were in his 1895-1905 cases. Analytical frameworks, and the distinctions made therein, serve to elucidate; they rarely tell us what judges and juries did in individual cases.

VII. Conclusion

We have tried, in this article, to describe a framework, a test, which might help to put into place the factors that seem to be central to defining the limits of strict liability in the areas of the law where it has come to dominate. We contrasted this test with the classical negligence calculus and its mirror image. We noted that this strict liability test seems more likely than either of the others to accomplish a minimization of the sum of accident costs and of accident avoidance costs. We

96. Morris, *Hazardous Enterprises and Risk Bearing Capacity*, 61 YALE L.J. 1172 (1952).

97. See, e.g., F. JAMES, CIVIL PROCEDURE § 7.4 at 240 (1965).

then discussed why we believe the move toward such a test cannot be explained solely in terms of distributional goals, though we readily admitted that such goals might also be served by the move. Finally, we expressed the view that even though such a test is very well suited to accomplishing an optimal reduction of primary accident costs, we would expect that in its application goals other than efficiency will often predominate.

Because Fleming James, through his writing, teaching, and warm colleagueship, first guided and then sustained our earliest as well as our more recent work in this field, we gratefully dedicate this piece to him. May retirement for him, as it was for his teacher, Arthur Corbin, simply be an opportunity to push the quest further.